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Supreme Court of the United States

OCTOBER TERM, 1962

No. 500

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA
AND
FENDALL R. ELLIS, DIVISION SUPERINTENDENT, CITY OF CHARLOTTESVILLE, VIRGINIA,
Petitioners

v.

DORIS DILLARD, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Date: October 9, 1962

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I.

INTRODUCTION

The School Board of the City of Charlottesville, Virginia and Fendall R. Ellis, Division Superintendent of Schools, hereby petition that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Fourth Circuit on September 17, 1962 (Appendix C). That judgment reversed that part of an Order entered by the United States District Court for the Western

District of Virginia on December 18, 1961, which related to the assignment of pupils to the elementary schools of the City of Charlottesville, Virginia.

The only issues Petitioners seek to have reviewed are those related to the method of assigning pupils to the elementary schools. There are no longer any disputed issues related to the assignment of pupils to the high schools of the city.

II.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 203 F. Supp. 225. The opinion of the Court of Appeals, with the two dissenting opinions (Appendix B) was filed on September 17, 1962 and is not yet in print.

The Order entered by the United States Court of Appeals for the Fourth Circuit on September 26, 1962 (Appendix D) recalled the mandate from the District Court and granted Petitioners a stay, provided they filed their petition for a writ of certiorari by October 10, 1962. By this Order all five judges of the Court of Appeals suggested that the issues here involved "merit review, especially".

III.

JURISDICTION

The opinion of the Court of Appeals, the two dissenting opinions and the judgment of the Court of Appeals are all dated September 17, 1962. It is thought that the judgment was also entered on that date. No petition for rehearing has been or will be filed.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

IV.

QUESTION PRESENTED

Must Petitions, who are charged with the administration of public schools in the City of Charlottesville, Virginia, be required, under the Fourteenth Amendment and decisions of this Court, to act favorably upon any and all requests of Negro children to transfer from school "A", which serves the zone of their residences, to some other school, solely because Petitioners, in administering a court approved desegregation plan which permits them to transfer pupils from one fixed geographical attendance zone to another when it is in the best academic interests of such pupils, have followed the practice of allowing transfers upon requests from certain white pupils living in the zone served by school "A", which is now occupied entirely by Negro pupils, and of allowing transfers upon requests from certain Negro pupils living in zones served by schools occupied entirely or predominantly by white pupils?

V.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves construction of the Fourteenth Amendment of the United State Constitution and the application of decisions of this Court prohibiting the administration of public schools on a racially segregated basis.

VI.

STATEMENT OF THE CASE

On February 18, 1959, the School Board of the City of Charlottesville adopted and put into effect its Public School Desegregation Plan (Appendix E). This plan was soon

thereafter approved by the United States District Court for the Western District of Virginia and it explicitly stated that "no pupil shall be denied admission to any public school of this city on the ground of race or color * * *".

The plan came under attack for the first time in August, 1960 and the District Court held that it provided a lawful way for assigning all pupils to the public schools of the city and that it was being administered by Petitioners in "good faith" and on a racially non-discriminatory basis. On appeal the United States Court of Appeals for the Fourth Circuit held that "the desegregation plan on its face is not objectionable on constitutional grounds since it provides a reasonable procedure without consideration of race or color by which school assignments are to be regulated". The Court, however, criticized certain ways in which the plan was being administered but did not reverse the District Court. See *Dodson v. School Board of the City of Charlottesville*, 289 F. 2d 439 (4th Cir., 1961). Thereafter Petitioners changed their method of administering the plan in an effort to satisfy the criticism of the Court of Appeals.

The sole question now to be considered relates to the method of assigning pupils to the elementary schools and of transferring them from one such school to another.

Under the desegregation plan the city was divided into six geographical zones of nearly equal size. In each zone is located an elementary school and every child, white or Negro, attending an elementary school is assigned initially to the school located in and serving the zone in which his residence is located.

Prior to September 1959 when racial segregation in these schools was brought to an end, the Jefferson Elementary School was occupied solely by Negro pupils and the other five elementary schools were occupied solely by white pupils. Under the desegregation plan, various Negro pupils were

admitted to a previously "all-white" elementary school and a previously "all-white" high school for the first time in September 1959. Since then a number of additional Negro pupils have been assigned to those two schools. It is admitted that as long as the previously "all-white" high school is not enrolled beyond its physical capacity, any Negro child in the city desiring to attend it may do so, regardless of place of residence or academic ability.

Although all children, white and Negro, are initially assigned to the elementary school located in and serving the zone of residence, under the desegregation plan the Superintendent may transfer any pupil to a school outside the zone of his residence "when the pupil and his parent or guardian indicate such a preference, provided that the Superintendent finds that such assignment would be consistent with the best academic interests of the pupil" and not cause the school to which the assignment is made to become burdened with an enrollment beyond its proper capacity. Relying upon this provision of the plan, the Superintendent acted favorably upon requests for transfer filed with him by a number of white pupils living in the Jefferson School Zone and assigned initially to that school because of residence. The Negro complainants in this case likewise live in the Jefferson School Zone and their requests for transfer were denied because the Superintendent found no academic advantage in their attending a school other than Jefferson, the school serving the zone of their residence. He did act favorably upon the request for transfer of one Negro child living in the zone because he considered the transfer to be to the academic interest of that child. Under the desegregation plan the Superintendent has the authority to do this and presumably he will allow the transfer of other Negro children from the Jefferson School Zone when such action will further the academic interests of the children involved.

Under the plan all Negro children living in any of the other five zones are initially assigned to the schools located in those zones. Prior to September 1959 these schools were occupied only by white pupils. A number of the Negro children living in those zones have requested transfers to the Jefferson School and the Superintendent has acted favorably upon all such requests. There is no evidence, or inference to be drawn from the evidence in this case, that requests for transfers filed by these Negro pupils were prompted by pressure or persuasion on the part of the teachers or school authorities. Under the plan white children living in these school zones are assigned to schools serving the zone of residence. They are not granted transfers to some other school unless an academic advantage from such transfer can be shown. As far as is known, no white child has received favorable action on a request for transfer from one of these schools to another. Furthermore, the method of assigning on a geographical zone basis has spread the enrollment among the various elementary schools in nearly equal proportions relative to the physical capacities of the respective schools.

The Negro complainants here involved admit that they live in the geographical zone served by the Jefferson School. They cannot contend that it is less convenient to attend this school than some other school. In fact the great majority of them live much closer to Jefferson School than to any other elementary school. They do contend, and this is the sole issue in the case, that they, along with all other Negro children in the Jefferson School Zone, are being denied their constitutional rights in not being permitted to transfer to some school other than Jefferson *solely* because certain white children living in that zone have been allowed to transfer to some other school.

The District Court found that the assignment and trans-

fer procedures here described did not offend the Fourteenth Amendment or decisions of this Court and that such procedures represented a lawful and practical method of assigning all pupils to the elementary schools under Petitioners' jurisdiction.

The United States Court of Appeals for the Fourth Circuit, after calling for reargument before the full court, reversed the District Court by a three to two decision, with Judges Haynsworth and Bryan filing separate dissenting opinions.

VII.

REASONS FOR GRANTING THE WRIT

In this case the Circuit Court has decided an important question of constitutional law which has not been, but should be, settled by this Court; furthermore, its decision is in conflict with recent decisions in the United States Court of Appeals for the Sixth Circuit.

Expressing the issue here involved in the light most favorable to Respondents, it is that Petitioners have adopted a procedure of granting transfers to pupils who request them so that they will not be placed in a racial minority in an elementary school; and that by following such practice Petitioners are denying the constitutional rights of Respondents when they do not act favorably upon their requests for transfer from the school serving their zone of residence, especially since certain white children have been allowed to transfer from the school serving such zone in order that they may not be placed in a racial minority in that school. Although the Charlottesville desegregation plan does not provide for this procedure in specific detail, as many other assignment plans do, the Charlottesville plan does permit it.

This very procedure was provided for specifically in the Nashville, Tennessee plan and it was declared to be in accordance with constitutional requirements by the United States Court of Appeals for the Sixth Circuit in *Kelley* v. *Board of Education of Nashville, etc.*, 270 F. 2d 209 (6th Cir., 1959). This Court denied certiorari in that case. See also to the same effect *Goss* v. *Board of Education of the City of Knoxville, Tennessee, etc.*, 301 F. 2d 164 (6th Cir., 1962). Upon being confronted with the identical question, the United States Court of Appeals for the Fifth Circuit has taken an opposite view. In *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir., 1960) that Court held that the so-called "minority transfer rights" could not be squared with the equal protection of the laws provision of the Fourteenth Amendment. This Court denied certiorari in that case.

As recently as October 8, 1962, this court granted a writ of certiorari in *Goss* v. *Board of Education, etc., supra* (U. S. Supreme Court Docket No. 217), and in doing so seems to have confined the issue to the same question as here presented. It is therefore respectfully suggested that by granting the writ herein sought and then consolidating the two cases for argument, the single question, common to both of them, can be presented in a way most helpful to this court.

It is known that district courts in Virginia approving desegregation plans in the Cities of Roanoke, Lynchburg and Arlington and in the County of Warren, have approved provisions which will result in the same practices as are involved here. Cases involving these communities will await the outcome of this Petition. It is to be expected that there are numerous other communities throughout the country similarly affected.

The majority and dissenting opinions in the United States

Court of Appeals for the Fourth Circuit show that the question here involved is one upon which able and conscientious judges at that appellate level cannot agree. The two dissenting opinions express the merit of Petitioners' contentions. Moreover, all five judges of that Court, by their Order of September 26, 1962 (Appendix C) have respectfully suggested to this Court that the issue merits review especially.

There is no inclination on the part of Petitioners to postpone a change in their assignment procedures simply for the sake of delay. This is demonstrated by the filing of this Petition within fourteen days of the entry of the Order recalling the mandate and granting the stay. They do, however, respectfully urge that the question here presented is of great importance not only to them, but to other school authorities throughout the country and that it is now hopelessly confused by an almost equal division of authority among the courts that have considered it. For the sake of consistency and harmony in complying with the *Brown* cases and *Cooper* v. *Aaron*, 358 U. S. 1, 78 S. Ct. 1401, this Court should grant a writ of certiorari and settle with finality the question here raised.

Respectfully submitted,

JOHN S. BATTLE
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Counsel for Petitioners

BATTLE, NEAL, HARRIS,
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Richmond, Virginia

Date: October 9, 1962

CERTIFICATE OF SERVICE

I, Richard L. Williams, a member of the Bar of the United States Supreme Court, and of counsel for Petitioners, hereby certify that the attached Petition for a Writ of Certiorari was served on the Respondents by depositing in the United States Mail, with first class postage prepaid, copies thereof addressed to S. W. Tucker, Esquire, 214 East Clay Street, Richmond, Virginia, Henry L. Marsh, III, Esquire, 214 East Clay Street, Richmond, Virginia, James M. Nabrit, III, Esquire, 10 Columbus Circle, New York 19, N. Y., Jack Greenberg, Esquire, 10 Columbus Circle, New York 19, N. Y. and Otto L. Tucker, Esquire, 901 Princess Street, Alexandria, Virginia, their counsel of record, this 10th day of October, 1962.

RICHARD L. WILLIAMS

APPENDIX A

Opinion by the Court

(Filed December 18, 1961).

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
Civil Action No. 51

DORIS MARIE ALLEN, etc., *et al.*,

—vs.—

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*

This is another step in the litigation involving the desegregation of the public schools of the City of Charlottesville. In February, 1959, the School Board of the City submitted a plan of desegregation of the schools which was approved by the court and as to the terms of which there was no controversy.

By an order of July 26, 1960, certain additional persons were allowed to intervene as plaintiffs and to file their complaint and motion for further relief, in which they alleged that the defendant School Board was not complying with the plan of desegregation previously submitted and approved but was continuing a policy of discrimination in the

assignment of pupils to the schools, and praying that the court re-examine and modify the plan of desegregation previously approved. After a hearing on the complaint of the intervening plaintiffs, the court in an order of August 15, 1960, accompanied by an opinion filed on the same date, denied the prayer of the intervenors' complaint to modify the previously adopted plan of desegregation and approved the action of the defendants in denying the plaintiffs admission to schools which they had applied to attend.

From the order of August 15, 1960, the plaintiffs appealed and the action of the Court of Appeals is set forth in its opinion rendered on April 14, 1961, under the style of Dodson vs. School Board of the City of Charlottesville, reported in 289 Fed. 2d 439. It will be seen from this opinion that the appellate court criticized the manner in which the plan of desegregation was being administered and pointed out its inequities. It refrained, however, from reversing this court's order of August 15, 1960, but did so only after expressing its confidence that the discriminatory practices which it pointed out would be promptly remedied by the school authorities of the City of Charlottesville.

This case having been retained on the docket for any action that might be necessary in the future, the plaintiffs, together with others who were allowed to intervene as such, have filed a motion for further relief in which they complain that, in the assignment of pupils to the public schools in Charlottesville, the school authorities continue practices which discriminate against Negroes, including those which the Court of Appeals condemned. The extent of the relief sought by the present motion appears to go somewhat beyond any which has been previously in issue, but it is believed that all the questions now raised can be determined within the purview of the opinion of the Court of Appeals in Dodson vs. School Board heretofore referred to.

The opinion of the Court of Appeals in this case recites clearly the practices which it considered discriminatory and the respects in which correction was called for, so that it is unnecessary to repeat them here. Following the rendition of the opinion by the Court of Appeals, and prior to the opening of the present school term, the school authorities made certain changes in the method of assignment of pupils to the several schools in an effort to meet the objections raised by the Court. It remains to be seen whether they have succeeded in doing so.

For clarity it may be again noted that for purposes of school attendance the City is divided into six geographical districts, each of which contains an elementary school. These schools are known as Burley-Moran, Clark, Johnson, McGuffey, Venable and Jefferson. The first five mentioned are schools which may be called "white" schools, i.e., where the attendance is composed wholly or predominantly of white children. Jefferson is the Negro school attended solely by children of that race. Merely for convenience these geographical divisions and schools will hereinafter at times be referred to as "white districts" or "white schools" and "Negro district" or "Negro school." It may be said that there are no geographical districts so far as high school attendance is concerned.

Coming now to the plan of assignment of pupils to the several schools, the plan as affects the elementary schools may first be considered for it is there that the most important question arises and the one most difficult of solution. Under the plan adopted with the beginning of the current school term and now in operation every child, regardless of race, is initially assigned to the school in the district in which he or she resides. This assignment is subject to the condition that if the school in the district where the pupil

lives and to which it is assigned is one attended wholly or predominantly by children of the opposite race its parents may apply for a transfer to a school in another district where the attendance is predominantly of its own race. The following quotation from defendants' brief sets forth the method of assignment now in force.

> "The change in the procedure for the current session was designed to enroll initially and automatically all pupils in the elementary schools serving the districts of their residences, no matter whether they were white pupils in Jefferson district or Negro pupils in some other school district; but relying upon the principle that no pupil should be compelled to attend against his will a school occupied entirely or predominantly by pupils of the opposite race, the Superintendent granted all requested transfers of the white pupils in Jefferson district and granted all requested transfers of Negro pupils residing in the other districts. The white children so involved were allowed to transfer to some school other than Jefferson and the Negro children so involved were allowed to transfer to Jefferson School. There were approximately One Hundred Forty (140) white pupils living in the Jefferson district who applied for such transfers and they were assigned in the current session to McGuffey, Johnson and Venable Schools, depending upon factors considered important by the Superintendent. Although it is not in the record, the writer is advised that there were approximately fifty (50) Negro elementary school pupils residing in the remaining five elementary school districts who sought and were granted transfers to Jefferson School."

In other words, and more briefly stated, those white children living in Jefferson district where the only school is a Negro school are assigned to that school, but if they so desire they may apply for a transfer to white schools in one of the other districts. Similarly Negro pupils living in one of the districts where the school is a white school are assigned to that school, but if they so desire may apply for transfer to the Negro school in Jefferson district. As stated in defendants' brief, above quoted, this course proceeds on the principle that no pupil either white or Negro should be compelled, against his will, to attend a school occupied wholly or predominantly by members of the opposite race, but should be allowed, if he prefers, to attend a school where his associates are of his own race.

It is obvious that this procedure falls far short of any complete or enforced integration of the school system. In fact it contemplates that there should be no compulsory integration. Nevertheless this court feels that it is permissible and is not discriminatory. The charges of discrimination are centered on the situation in Jefferson district where the white children resident there are permitted to transfer to schools in other districts, whereas Negro children resident in Jefferson are not allowed to transfer to other districts. But a similar condition, in converse, obtains in the other five districts where resident Negro children are permitted to transfer to Jefferson while white children are restricted to the district where they reside. Attention centers on Jefferson district because of the accident of residence and school location. It is in Jefferson that the large majority of the Negro school population lives and it is there that is located the school heretofore designated for Negro children. In insisting that Negroes resident in Jefferson district attend Jefferson school the authorities are

merely following the principle of requiring pupils to attend the school within their area of residence. They apply the same restrictions upon white children in the other areas. And any departure from this policy in the cases of white children living in Jefferson and Negroes living outside of Jefferson is based on the desire to avoid compelling children of either race to attend school with members of the opposite race if they wish not to do so.

One alternative to this policy would be the assignment of all pupils solely on the basis of residence with no transfers permitted, resulting in enforced integration of all schools. It is not believed that the law requires this nor, apparently, is it at present desired by a majority of either race. Another alternative would be to allow pupils of both races to attend any school they might choose anywhere in the city. The result of this would be chaotic with some schools practically deserted and others crowded far beyond capacity. Taking all factors into consideration the present plan of assignment tends to an orderly administration of the school system and, in my opinion, cannot be said to discriminate against the Negro children. This view is based on the assumption that the plan will be carried out in good faith and its terms adhered to in practice without the introduction of other conditions which may be used in a discriminatory manner.

It must be said that there is some indication of inconsistency in carrying out the plan of assignment. There is shown the instance where a Negro child resident in Jefferson district was assigned to Venable school. The reason given by the Superintendent of Schools is that the child was of exceptional intelligence and it was thought that she would profit by attending Venable. However, this action did not conform to the promulgated plan of assignment and

forces the surmise that it was taken to afford a denial of unfair discrimination against Negroes. But it points to a questionable factor in the administration of the assignment plan and to a means whereby it may be used in a discriminatory manner; namely, in the right of the Superintendent to exercise his judgment as to whether attendance at a particular school is to the best interest of the child and to make assignments or to make or deny transfers in accordance with such opinion. The free exercise of such a right can be used to make discriminatory any plan no matter how fair upon its face.

It seems necessary, therefore, to eliminate from the plan of assignment all factors except that of residence, and to base the granting of transfers solely on the desire of pupils to attend a school with members of their own race. I am well aware that academic attainment and scholastic aptitude have been deemed by many courts as proper for consideration in the determining what school a child should be assigned to. But when they are used to discriminate between the races they cannot be allowed. I think it evident that their use has effected discrimination in Charlottesville whether it was so intended or not. This will be apparent when we come to consider high school attendance.

In the area of high school attendance it is plain that the practices in force cannot be approved in the light of the Court of Appeals opinion in Dodson v. School Board. So far as appears no significant change has been made in the practices there condemned. The two high schools in the city are Lane, the school for white pupils, and Burley, the school for Negroes. No areas of residence have been fixed for attendance at these schools, and before this litigation began all white pupils in the city went to Lane and all Negroes to Burley. As a result of court action in recent

years some Negroes have been admitted to Lane while all white students continue to go there. However in determining attendance at Lane different rules are applied as between white and Negro children. Any white child who finishes elementary school may enter Lane High School automatically—i.e. without being subject to any test or condition as to residence or academic qualification. On the other hand, in order to attend Lane, Negroes must live closer to that school than to Burley and must also satisfy certain tests touching their scholastic advancement and intelligence. These practices, as the Court of Appeals has emphasized, are plainly discriminatory. For example, four of the plaintiffs here were denied admission to Lane because their records in elementary school showed them to be backward or lacking in studiousness and, in the opinion of the Superintendent, their academic deficiencies were such that they could not have assimilated the course of instruction at Lane and would have fallen behind other students there. There may have been justification for his belief but no such criteria were applied to white pupils entering Lane. Similarly several other Negroes were denied admission to Lane because they lived closer to Burley, a test which also is not applied to white pupils.

Here again we run into the discrimination which may be, and is, practiced by applying the tests of academic attainments and aptitudes as a reason for barring Negroes from entrance to previously white schools. These criteria are all the more open to question because they are indefinite. In reality they merely represent the belief of the Superintendent of Schools that the Negro child would not do satisfactory work if allowed to enroll in the white school. And this calls to attention another condition which seems in large measure to be responsible for the reluctance to assign

Negroes to Lane when their academic qualifications are not of high standard, namely, the difference in the courses of study at the two high schools. The curriculum at Lane is about the same as the average white high school, designed to prepare students to enter the standard college and pursue their education there. At Burley more attention is given to manual training and studies aimed to furnish the student a means of livelihood at some manual or domestic employment upon finishing high school. Some of the college preparatory courses given at Lane are absent from Burley. Speaking of this the Superintendent of Schools said that Burley "can take better care of children whose competences don't lie in the academic realm." This condition lends encouragement to the practice which the school authorities have exercised of considering the academic record and prospects of pupils in assigning them to one school or the other. Negroes displaying good records and high intelligence may be, and some have been, assigned to Lane. But those of less promise are sent to Burley. This right to assign the Negro pupils in accord with the judgment of the Superintendent of Schools is one earnestly insisted on by him, as evidenced by this excerpt from his testimony:

> "If you are operating an educational institution, whose purpose is to educate children, and if you don't have the power to assign children in accordance with their educational best interests, I don't see how you can operate the school system, except at the whim and fancy of the most irresponsible elements in the community."

Without passing on the merit of the quoted statement, it need only to be said that the power of assignment if granted

must be exercised without discrimination and the factors on which it is based must apply alike to both races, which has not been done in the assignment of pupils to the Charlottesville high schools.

In summary, therefore, I am of opinion that the present rules governing assignments to *elementary* schools are not unlawful and are free of the faults which the Court of Appeals noted. This finding, however, is based on the assumption that the plan now in effect will be strictly carried out and that no criteria of intelligence, academic qualifications, or similar or related tests of any sort will be applied to Negro children unless and until a general plan formulating such criteria is adopted for application to all pupils in the elementary schools of the city.

As to the high schools it is plain that there must be an abandonment of the practice of submitting Negroes to the criteria of residence and of scholastic aptitude or related tests, so long as similar tests are not applied to white children. At present white pupils are allowed to attend Lane High School without regard to where they live in the city and without regard to their scholastic attainments or prospects. The same privilege must be accorded to Negro students. There will, of course, be a like unrestricted right available to both races to attend Burley High School. This in effect means that as matters now stand attendance at the high schools in Charlottesville is to be based solely on the student's decision as to which school he prefers to attend.

I am aware that the elimination of all criteria as to academic aptitude and similar tests in the assignment of pupils in both the elementary and high schools and the giving of freedom of choice in high school attendance will be objectionable to the school authorities and will be met with the charge that it is disruptive of an orderly and efficient ad-

ministration of the school system. It may create some problems, but if so it can only be said that the original source of these troubles lies in the discriminatory practice heretofore existing.

I have carefully considered what was said by the Court of Appeals in its opinion in Dodson vs. School Board and have carefully considered the steps to be taken to satisfy the criticisms there made. And while the requirements which I have herein set out nullify some standards for assignment of pupils which have elsewhere been approved, I can see no other way, under the facts of the present case, whereby the mandate of the Court of Appeals can be carried out. It may be at some future time that the school authorities of Charlottesville can arrive at a plan for pupil assignment which permits greater latitude in the assignment of individual students; but it goes without saying that when such a plan is devised it must apply impartially to children of both races.

District Judge.

December 18, 1961

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8638

Doris Dillard, Vernetta Dillard, Karol L. Williams, Scheryl Williams, Althea L. Blakey, Sylvia V. Blakey, Phyllis Elaine Blakey, Phyllis Chapman, Earl Chapman, Cynthia A. Daniels, Earl Murray, Grace Murray, Gloria Murray, Theresa Murray, Allegra F. McCullough, Arnita C. Swift and Ellis A. Swift, infants, by and through their respective parents or guardians and next friends,

Appellants,

versus

The School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,

Appellees

and

The School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,

Appellants,

versus

Carolyn Marie Dobson, Melvina P. Hamilton, Gloria D. Hamilton, Rebecca A. Muse, Ruby Yvonne Dickerson, Betty Ann Swift (Harris) and George W. King, III,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. John Paul, District Judge.

(Reargued July 9, 1962. Decided September 17, 1962.)

Before Sobeloff, Chief Judge, and Haynsworth, Boreman, Bryan and J. Spencer Bell, Circuit Judges, sitting en banc.

S. W. Tucker (Henry L. Marsh, III, Otto L. Tucker, Jack Greenberg and James M. Wabrit, III, on brief) for Appellants and Cross-Appellees, and John S. Battle, Jr. (Battle, Neal, Harris, Minor & Williams on brief) for Appellees and Cross-Appellants.

Per Curiam:

This appeal was first heard by a panel consisting of Senior Judge Soper, Chief Judge Sobeloff and Circuit Judge Boreman. An opinion was prepared by Judge Soper, but before it was announced by the court a hearing en banc was ordered, in which the five active judges of the court sat, but Judge Soper did not participate.

Judge Soper's opinion, which Sobeloff, Boreman and Bell, JJ. adopt as the opinion of the court, is as follows:

Cross-appeals again bring to this court questions arising in the administration of the public schools of Charlottesville, Va., with respect to the assignment of white and Negro children in the elementary and high school grades.* Our most recent decision in *Dodson v. School Board of the*

* The opinion of the District Court is reported at 203 F. Supp. 225.

City of Charlottesville, 289 F. 2d 439 (1961), outlines the steps that the School Board had then taken toward the integration of the races in the schools and the plan of operation for the school year 1960-1961. The plan involved the division of the City into six geographical districts, each of which was served by one of the elementary schools, to wit: Jefferson, Venable, Johnson, Burnley-Moran, Clark and McGuffey. It was provided that each child should attend the school located in the zone of his residence and since a large majority of the Negro residents live in the Jefferson District the result was that, with the exception of some 13 Negro pupils attending the predominantly white Venable School, all of the Negro elementary pupils were enrolled in the Jefferson School, which no white pupils attended. No Negro pupils were assigned to the four other elementary schools. The plan, however, provided that the parents of any child, white or colored, could request a transfer and the superintendent of the schools was empowered to grant such a request after consideration of various criteria applicable to white and Negro pupils alike, including factors affecting the immediate interests of the pupils and the efficient administration of the schools.

Two high schools were operated in the City, Lane and Burley. There were no zones for admission to these schools but the superintendent was guided in making assignments of students by the pupil-teacher ratio, convenience of attendance, academic qualifications and, to some degree, by the preference of the pupil and his parents. The transfer provisions were the same as those applicable to the elementary schools.

Prior to the plan for desegregation Lane was all-white and Burley all-colored. In 1960-61, at the time the *Dodson* case was brought, thirteen Negro elementary pupils had

been assigned to Venable and seven Negro high school students had been assigned to Lane. That suit was instituted on behalf of four Negro pupils whose application for admission to white elementary schools had been denied because they resided in the Jefferson district and also on behalf of six Negro high school pupils whose application for admission to Lane had been denied, four because of academic deficiency and two because they resided nearer to Burley than to Lane. Having been denied relief in the District Court the plaintiffs appealed to this Court. We upheld the Board's plan but condemned the Board's application of the plan as discriminatory and unconstitutional. We pointed out that all Negro elementary pupils were initially assigned to Jefferson whatever the zone of their residence but white pupils living in Jefferson were initially assigned to white schools in other districts. In respect to high schools we showed that all colored pupils were initially assigned to Burley and all white pupils to Lane and that Negro pupils desiring to transfer to Lane were subjected to residence and academic tests which were not applied to white students seeking admission to Lane. We recognized that these practices were discriminatory but, upon the assurance of the Board that they were transitory, we remanded the case to the District Court to reexamine the situation with regard to the ensuing school year, 1961-1962, "confident that steps [would] be taken promptly to end the present discriminatory practices in the administration of the desegregation plan". 289 F. 2d 444.

Mindful of this admonition the School Board made certain changes in its plan of operation. The assignment of each elementary school pupil, white or colored, was made to the school in his residence zone. This step, of course, tended to perpetuate the earlier practice of segregation;

but transfers were permitted in the following fashion. Elementary pupils, white or colored, assigned to schools where they were in the racial minority were permitted with the consent of their parents to transfer to a school in another district where they would be in the racial majority. Thus a white child living in the Jefferson colored district could transfer to a school in one of the five white districts and a colored child living in one of the white districts could transfer to Jefferson. To effectuate this plan a form letter was sent by the Superintendent of the schools to the parents of each child attending an elementary school outside the zone of his residence stating that the child had been tentatively reassigned to the same school, but that the child could remain in that school only if the parents specifically requested it. A form to be signed by parents was attached to the letter.

Through this procedure all of the white pupils, 149 in number, who lived in the Jefferson area were granted "transfers" to schools in the other zones and approximately 50 Negro elementary school pupils residing in the white districts were "transferred" to Jefferson. Nine additional Negro pupils were admitted to the Venable elementary school, bringing the total number in attendance to twenty and nine additional Negro high school pupils were admitted to Lane, bringing the total to sixteen.

The School Board reached the conclusion that by adopting this plan they had eliminated all racial discrimination and, accordingly, they rejected the applications for transfer to other districts of seventeen Negro elementary pupils residing in the Jefferson district. On their behalf the present suit was brought in the District Court to restrain the actions of the Board but the District Judge held that the plan was valid and this appeal followed.

The question for decision is of especial importance in the administration of the Charlottesville schools in view of the Board's past operations and its present attitude in the administration of the school system. When it is noted that despite prolonged litigation all of the Negro elementary school pupils in the City, other than the twenty assigned to Venable, are still enrolled at the all-Negro Jefferson school, while all of the white students attend one of the five elementary schools in the other districts, and that all of the Negro high school students except sixteen attend the all-Negro Burley High School, it is clear that little change has been made in the administration of the elementary schools from that which prevailed when the schools were completely segregated. It seems equally clear that little progress in the integration of the schools may be expected if the Board is permitted to pursue the policy which, after mature consideration, it has deliberately adopted.

The Board's argument is that there is no racial discrimination in the enrollment of the pupils in the elementary schools for the following reasons. The Board has abandoned the plan contained in our decision in the *Dodson* case. Under that plan Negro pupils wherever they lived were initially assigned to Jefferson and white students were initially assigned to the school of the zone of their residence; and since transfers were only sparingly permitted the admission of colored pupils into white schools was effectually prohibited and segregation was prolonged. Under the new 1961-1962 plan, says the Board, every child whether white or Negro is initially assigned to the school of his residence district and transfers are granted to white and colored children under the same rule or restriction. Any child may transfer from a school in which his race is in the minority to a school in which his race is in the majority and since this plan applies to both races alike there is no discrimination.

In support of its position the Board relies on *Kelley* v. *Board of Education of the City of Nashville*, 6 Cir., 270 F. 2d 209,* where it was held that a transfer provision is not invalid which permits voluntary transfers of white and Negro students who would otherwise be required to attend schools previously serving only members of the other race, or where the majority of the students are of the other race. The Court thought that this plan was not invalid since the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483, did not deprive persons of the right of choosing the school they desired to attend but merely held that a person may not be denied the right to the school of his choice because of his race. The Sixth Circuit, however, in its subsequent decision in *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 301 F. 2d 164 (1962), observed that the application of this transfer provision may become a violation of constitutional rights and consequently admonished the Board not to use it as a means of perpetuating segregation. And see *Maxwell* v. *County Board of Education of Davidson Co., Tenn.*, 301 F. 2d 828, 6 Cir., 1962. Moreover, the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43, differing from the views set out in the *Kelley* case, disapproved a desegregation plan which included a transfer provision like that practiced in Charlottesville. It held, 285 F. 2d 48, that "classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." In *Mapp* v. *School Board of Chattanooga*, D.C.E.D. Tenn.

*Certiorari was denied in this case, 361 U. S. 925, three justices indicating that they would grant the petition limited to the question whether certain provisions of the Nashville plan were invalid for the reason that they "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination."

1962, 203 F. Supp. 843, 853, the District Court, in accord with *Boson* v. *Rippy*, *supra*, said that "any transfer plan, the express or primary purpose of which is to prevent or delay the adoption or implementation of the plan of desegregation herein developed, should not be approved."

In our view the Charlottesville plan in respect to the pupils in the elementary schools is clearly invalid despite the defense that the rules for the assignment and transfer of pupils are literally applied to both races alike. It is of no significance that all children, regardless of race, are first assigned to the schools in their residential zone and all are permitted to transfer if the assignment requires the child to attend the school where his race is in the minority, if the purpose and effect of the arrangement is to retard integration and retain the segregation of the races. That this purpose and this effect are inherent in the plan can hardly be denied. The School Board is well aware that most of the Negro pupils in Charlottesville reside in the Jefferson zone and that under the operation of the plan white children resident therein will be transferred as a matter of course to the schools in the other zones while the colored children in the Jefferson zone will be denied this privilege. The seeming equality of the language is delusive, the actual effect of the rule is unequal and discriminatory. It may well be as the evidence in this case indicates that some Negroes as well as whites prefer the schools in which their race predominates; but the wishes of both races can be given effect so far as is practicable not by restricting the right of transfer but by a system which eliminates restrictions on the right, such as has been conspicuously successful in Baltimore and in Louisville.

It was suggested during the argument of the appeal that a reversal of the judgment of the District Court might lead

the Board to deny all transfers in the Charlottesville schools. We take this occasion to say, however, that such a step might well be as obnoxious as that employed by the Board in the case at bar. A similar plan was condemned in *Taylor v. Board of Education of New Rochelle*, 2 Cir., 294 F. 2d 36.

We do not mean to say that the School Board has no discretion in the assignment of pupils to the Charlottesville schools, but in respect to the elementary children in this case the Board has applied no criteria that would stand the constitutional test and, therefore, in the interest of these children further delay in the exercise of their constitutional rights cannot reasonably be granted.*

We, therefore, hold that as to the seventeen elementary children, who were plaintiffs in the court below, the judgment be reversed and the case remanded to the District Court so that appropriate steps, by injunction or otherwise, may be taken to secure their admission to the schools of their choice for the 1962-1963 school year.

The cross-appeal by the School Board in this case relates to the judgment of the District Court that nine Negro high school pupils who were excluded by the Board from the Lane High School be admitted to that institution. Subsequently, the Board admitted two of the nine and as to them the cross-appeal is expressly abandoned in the Board's brief in this Court. Four of the remaining seven were before this Court in the *Dodson* case, where we noted that they had been excluded from Lane for academic deficiency and said that residence and academic tests may be properly applied in passing on the applications for admission to a school provided that the factors of race and color are not considered, 239 F. 2d 439, 442. Since it was shown that the tests were not applied

*The operation of the Charlottesville schools was brought to our attention in 1956 in *School Board of the City of Charlottesville v. Allen*, 240 F. 2d 59.

to white children in the same situation we held that the four plaintiffs had been discriminated against. Nevertheless, we affirmed the judgment below in the confident belief that discrimination between the races in the admission of high school students would be eliminated by the Board itself. In this respect our hopes have been disappointed. The Board has abandoned the residence tests as to high school children but has made no change in the academic tests. The four Negro high school pupils who were before us in the *Dodson* case, and in addition three other high school students, all of whom are cross-appellees in this case, have been denied admission to Lane because of alleged academic deficiency. The Board's position is that their admission into a school for which they are not qualified will not only be detrimental to them but to the school itself and, therefore, they should be excluded. Obviously, these factors are worthy of consideration in the operation of any school system. The difficulty is, however, that the Board admits white children to Lane without tests, irrespective of their academic qualification, upon the theory that they should not be denied any high school education whatsoever. The alternative of sending them to Burley is not deemed worthy of consideration. The discrimination involved is too clear to require discussion. Not only are academic tests applied to Negroes only but Negroes who are considered so deficient in academic achievement that their admission to Lane would be detrimental to the school, are sent to Burley without regard to the consequences. *See Bush* v. *Orleans Parish School Board*, E. D. La., New Orleans Div., ... F. Supp. ....., decided April 3, 1962.

Accordingly, the judgment of the District Court regarding the admission of the nine high school students to the Lane High School will be affirmed and the case will be re-

manded to that Court in order that appropriate steps may be taken to put the judgment into effect.

Reversed in part and affirmed in part and remanded for further proceedings. Let the mandate issue immediately.

Albert V. Bryan, Circuit Judge, with whom Haynsworth, Circuit Judge, joins, dissenting:

Without semblance or hint of gerrymandering—so conceded by the appellants—school districts were laid out by the Charlottesville School Board for elementary classes in a plan of desegregation which had been filed at the instance of the District Court: each child regardless of race is assigned to the school in the district of his residence. Then, any pupil is allowed—by merely a telephone call—to transfer from any school in which his race is not in the majority. Yet this arrangement is now stricken down by the Court because in the operation of the transfer feature as to one school—Jefferson—there can be no transfer of a Negro student from that school inasmuch as it is predominantly Negro. This is said to be discrimination. I think the conclusion erroneous both in fact and in law.

I. It is not discrimination in fact because the same right of transfer as the white children have at Jefferson is accorded colored children in schools that are mostly "white". The same restriction of the Negroes at Jefferson is applied to the white children in the other schools. The Negroes may transfer from the latter—and 50 of them did—whereas no white student can leave those schools. It is argued that the white children would not desire to leave a "white" school but the Negro would want to leave Jefferson, and thus he is deprived, because of his color, of the "right" to attend an

integrated school. This is to argue, also, that by leaving Jefferson School the white children create segregation there. With equal reason it may be argued that the colored children in departing from the other schools caused segregation there. All of these contentions wrongly ignore three vital considerations: the fairness of the entirety of the plan; the Fourteenth Amendment does not guarantee a student an integrated school to attend; and the "segregation" here is not the result of the plan but of individual choices of individual students.

The Negro was not placed at Jefferson because he was a Negro, nor was the white child enrolled at another school because he was white. Neither was so placed in order to keep them apart. They are in their respective schools solely because of the location of their respective residences and for no other reason. The Jefferson residence district, to repeat, was not arbitrarily formed.

Approval of the plan of the Charlottesville Board has been declared by this Court. In Dodson v. School Board, 289 F. 2d 439 (4 Cir. 1961), we said of it, at p. 442:

> "At the elementary school level, the plan contemplates that every child, regardless of race, shall be sent initially to the school of the district in which he lives, and after such initial assignments, there may be transfers if the parents so request and the superintendent approves. *This is a perfectly acceptable method of making school assignments*, as long as the granting of transfer is not done on a racially discriminatory basis or to continue indefinitely an unlawful segregated school system. . . ."

The only criticism of the plan there made was the initial assignment of all Negro elementary pupils in the city to Jefferson, rather than to the school of their residence. This

was corrected. So that now the only objection urged is that the Negro student does not have freedom to move out of Jefferson when that is the school of his residence.

The Sixth Circuit approved an equivalent of the Charlottesville transfer provision in Kelley v. Board of Education, 270 F. 2d 209, 228 (6 Cir. 1950) *cert. denied* 361 U. S. 924, and more recently in Goss v. Board of Education, 301 F. 2d 164, 168 (6 Cir. 1962) and Maxwell v. County Board of Education, 301 F. 2d 828, 829 (6 Cir. 1962). Contra: Bason v. Rippey, 285 F. 2d 43, 47 (5 Cir. 1960); but see Rippy v. Borders, 250 F. 2d 690, 693 (5 Cir. 1957) *post* p. 4. Taylor v. Board of Education, 294 F. 2d 36 (2 Cir., 1961) *cert. denied* 368 U. S. 940, decided by a divided court is not authority to sustain the Court here. There a suburban New York City school district had been deliberately drawn so as to encompass Negro residents only.

II. In law there has been no discrimination, for the Negro child has not been denied any privilege through policy, usage, law or regulation. If there has been a deprivation, it is—solely, actually and not capriciously—the result of the geographical location of his residence. This is a consideration understandably overlooked by the Court in the generality of its statement that the infrequency of Negro attendance in "white" schools is itself proof of discrimination.

Jefferson School District, as previously noted, was not a discriminatory division. It came about, as often occurs in many cities, through the Negroes' living in a concentrated area. This may change, and thereafter alter the play of the residence and transfer rule at Jefferson. But until then the residents of the area must abide by rules and regulations based on just and fair district lines. No constitutional or legal question is presented. No Government authority has allocated them to a special section of the city or centered their population in a specific territory.

The fundamental reason of the Court for holding the refusal of transfer of Negroes to the Jefferson District to be discrimination seems to be that the refusal deprives the Negro children of association with white children, all of whom have transferred from Jefferson District. There is no other grievance suggested in their remaining at Jefferson. The Court further manifests this reason when it says that the residence and transfer provision retards "integration".

"But even if this is the result of the Charlottesville plan—although entirely incidental—nevertheless it would not be a violation of the doctrine of Brown v. Board of Education, 347 U. S. 483 (1954) and subsequent commentary decisions. The Supreme Court was explicit there in not requiring integration, but in merely striking down denial of rights through segregation. The point was sharply made in Briggs v. Elliott, 132 F. Supp. 776 (E. D. S. C. 1955). It is too late now to question this as the plain holding of that three-judge court. Judge Parker, a member of that panel, confirmed this meaning when he spoke for this Court in School Board of Charlottesville v. Allen, 240 F. 2d 59, 62 (4 Cir. 1956) *cert. denied* 353 U. S. 911, and again in School Board of City of Newport News v. Atkins, 246 F. 2d 325, 327 (1957). Substantially this very statement was approved with emphasis by the Fifth Circuit in Kippy v. Borders, 250 F. 2d 690, 693 (1957). Furthermore, on remand of Brown v. Board of Education, the District Court from which it originated, following the rescript of the Supreme Court immediately after its *second* and implementing school decision, Brown v. Board of Education, 349 U. S. 294 (1955), stated the proposition with equal clarity as follows:

> "Desegregation does not mean that there must be intermingling of the races in all school districts. It

> means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> "If it is a fact, as we understand it, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

Brown v. Board of Education, 139 F. Supp. 468, 470 (D. Kan. 1955). Like decisions in other Circuits are cited in the dissent in the Second Circuit (N. Y.) case of Taylor v. Board of Education, supra, 294 F. 2d at 47, n. 4.

Our Court's opinion now seems to hold that if a racial minority in a school zone is given a right to transfer out, every member of the racial majority in that school must be given the same right—otherwise the rule is unconstitutional. Applied to Jefferson School the opinion intimates that the Negro pupils there—the great majority of the student body—should be permitted to transfer in the same way as the minority. But the Court denied this very right to the majority in McCoy v. Greensboro Board of Education, 283 F. 2d 667 (4 Cir. 1960). There the Board granted the requests of Negro children to enter a "white" school, then afterwards allowed the transfer of the majority—all white children—to another school. The transfer of the majority was held invalid because it left a minority composed of Negroes only. This again was apparently on the thesis that it resulted in a separation of the races whereas the law requires integration—a theory I find untenable.

III. The transfer rule is simply a means of permitting a child to express his wishes. Surely, to allow a child such an option—even though his wishes be based on racial grounds—is not unconstitutional. Allowing expression by

both races so far as practicable—with equal opportunity—of their preferences in a personal matter has not in any degree been precluded by the Supreme Court in its efforts to solve the school problem or in any other field. The Court has merely ruled against enforced separation of persons of different races by reference to objective criteria. Never has the Court denied the exercise of the personal tastes of the races in their associations.

The judgment of the District Court in respect to the elementary school appellants should be affirmed. In regard to the high school appellants I express no disagreement with the majority.

HAYNSWORTH, Circuit Judge, with whom Bryan, Circuit Judge, joins, dissenting:

I agree with my brother, Bryan, and I join him in his opinion.

I am prompted to turn to other considerations, however, for it seems to me the two opinions are on an esoteric plane far above practical problems confronting school boards. Practical, difficult problems do arise in many places as school boards undertake the task of conversion of school systems to a basis of operation which counters social customs and patterns of conduct, which, over a period of centuries, have become deeply ingrained in a people. The Supreme Court in 1955 recognized that such problems would be encountered and directed that they be not ignored.[1] School boards were allotted the duty of solving and overcoming those problems with all deliberate speed, while the lower federal courts were

[1] Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083.

required to enter appropriate orders when school boards neglect their duty. It is not for the courts, however, by overlooking the practical problems, to impose difficulties in the way of a school board struggling, even though with some reluctance, to achieve the goal that has been set for it.

As I approach the practical situation, in terms of which I think the legal issue here should be framed, I do so with awareness that the case has not been presented on that basis. The question whether discrimination inheres in a geographic assignment plan, if accompanied by a provision for permissive minority transfers, has been tendered in general and abstract terms.[2] The Court answers it in those terms.[3] The

[2] The question tendered, in effect, is this: If A and B, one of whom is Caucasian and the other Negro, each of whom is a member of a racial minority in the school to which he is assigned, are both allowed to transfer, is there a denial of the equal protection of the laws to X, if X and Y, a Negro and a Caucasian, each of whom is a member of a racial majority in the school to which he is assigned, are both denied transfers? Since the conundrum elides the fact, or the possibility that it may be the fact, that there was good reason for allowing the transfers of A and B and no comparable reason for allowing the transfer of either X or Y, the resultant discussion, interesting though it may be, is esoteric abstraction.

[3] The majority concentrates attention upon A and X, both of whom had been assigned to the same school. That concentration does not make the resulting discussion concrete, for the opinion does not consider their disparate circumstances or the bearing of those circumstances upon the reasonableness of a general rule allowing the permissive transfer of the one, but not of the other.

The majority also points to the fact that the Board's plan permits actual mixing of the races in the schools at a slower rate than might occur under some other plan, not adopted by the School Board. Such a fact may bear more or less heavily upon the reasonableness of a particular plan under particular circumstances, but, of itself and without regard to other facts bearing upon the reasonableness of the Board's conduct, it is not a final answer. The same thing may be said of every interim arrangement which has met the approval of the courts. Indeed, the same thing may be said of a geographic assignment plan unaccompanied by any provision for permissive minority transfers.

School Board has sought affirmance of the District Court's approval of its plan on the basis of its belief that the plan, generally and abstractly, is not discriminatory. It has not asked that it be approved as a reasonable amelioration of a particular problem during a transitional period. That it asked for more, however, does not mean it should get less than its due. If its plan merits temporary approval as a transitional measure, its disapproval should not be unqualified.

One may thus concede the reasonableness of the abstract principle declared by the majority and reasonably hold the view that the majority should have proceeded further to consider whether the plan, with its determined defects and shortcomings, might not be permissible as a temporary expedient. If the present record is insufficient for that purpose, it could be supplemented upon remand. At least, the implication that the abstract principle will be applied in other cases, no matter how compelling the reasons for the school board's adoption of a similar plan, ought not to be left open.

Those conversant with the problems of desegregation in the South, know the intensity of public concern over the plight of children constituting a small minority unwillingly assigned to a school in which an overwhelming majority is of the other race. If separation of Negro children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"[4] such a child may be subjected to a much more searing experience if, bereft of established friends and relations, compelled to attend a school or classes in which all others are of the opposite race. Some children could adjust themselves to such a

[4] Brown v. Board of Education, 347 U. S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873.

situation, but in the early stages of desegregation when the force of old customs and practices is unspent, many could not. Those who could not adjust to such a radical change would likely have senses of inferiority greatly intensified, and unadjusted children too frequently become the butt at the hands of their fellows of those unrestrained cruelties of which children of all races are capable. If such unadjustable children are compelled to remain in an intolerable situation, the damage to their emotional and mental development and well-being will be irreparable.

It is because of such widespread concern over the plight of unwilling minorities in particular schools that school boards throughout the South have adopted permissive transfer provisions in association with assignment plans based upon attendance areas or other objective criteria. In some places, such a provision may be essential to the institution or continuance of a plan of desegregation, for it touches an area of peculiar public sensitivity, and school boards cannot operate public school systems without public support.

Provisions for permissive minority transfers are founded upon an assumption that the transition to a fully desegregated school system will create personal problems for unwilling minorities in particular schools, especially when the minority is relatively small, which differ in kind and degree from the problems which majorities, especially relatively large majorities, may be expected to encounter. The assumption seems plainly valid, for it hardly is to be doubted that a child well adjusted in school A where his race predominates, where he has established friendships and where he ardently wishes to be, may become very maladjusted if compelled to attend school B where his own race is a small minority, where he has no established friends and where racial differences may become greatly magnified in his own mind. Such

a problem is obviously more acute and more difficult to overcome than any personal problem which may be anticipated by members of racial majorities, unseparated from established friends, compelled to accommodate themselves to the presence or absence of a minority of pupils of the other race.

Of course, the magnitude of the personal problems and of the difficulties in the way of requisite adjustments will vary with individuals and with differences in environmental conditions. A child who might encounter insurmountable difficulty, as a member of a small minority, in making the personal adjustment, might encounter little difficulty if the minority group was relatively large, 40%, for instance,[3] and included others who were his old friends. Such variances, however, do not militate against the general validity of the assumption that, in the transitional period, unwilling members of minority groups will encounter difficulties and problems which are different in kind and degree from those which members of majority groups may be expected to encounter.

This kind of problem exists whatever the race of the minority group. That present provision for permissive minority transfers is in the interest of Negro minorities is suggested by the extent to which they avail themselves of it. This very record discloses that fifty Negro pupils availed themselves of the permissive right to transfer to Jefferson School, rather than attend the predominantly white schools in the attendance areas of which they resided.

The majority, of course, does not hold that unwilling minorities may not be allowed to transfer. It does hold that if such transfers are allowed as of course, the same right of transfer must be extended to every other child regardless of the dissimilarities of his circumstances. The provision for minority transfers is treated as a virus which so in-

[3] Of course, that is not this case.

fects an otherwise objective, nondiscriminatory, lawful, geographic assignment plan, that the plan may not be enforced as to anyone. Provision for protection of the special interest of minorities is related to malice, which, naked and alone, is not unlawful, but which makes unlawful and actionable a communication which otherwise would be privileged and unactionable.

The necessary result of the opinion, therefore, is a stricture on provision for permissive transfers of protesting members of minority groups whenever a school board finds it necessary or desirable to adopt or continue an enforceable geographic assignment plan. The consequence will be that the discretion of school boards is circumscribed, and, in some instances, the effective adoption of any plan may be made impossible.

I do not understand the court to say that, in the absence of a blanket provision for the transfer of unwilling members of minority groups, a transfer of one such child, for good reason, would deprive the school board of its power of enforcement of all other assignments. It certainly should not. School boards always have had, and always should have, discretionary power to treat exceptional cases as exceptional. If a school board, having adopted a geographic assignment plan without a minority transfer provision, was confronted with proof that a particular child had previously attended a segregated school attended solely by members of his own race where he worked well and was well adjusted, but, assigned under the plan as one member of a small minority to another school predominantly populated by pupils of the other race, had encountered insurmountable difficulty, that his progress had been arrested and he was suffering great emotional and mental harm, and if such proof was accompanied by the urgent plea of the child and his parents

that he be transferred back to the school he formerly attended, must the school board ignore the plea or suffer loss of its power to control all other assignments which it had made under its geographic assignment plan? I would say, obviously not.[6] Every exception to a general rule, if made with good reason, does not invalidate the rule. A permissive transfer of a child whose personal need makes a transfer requisite, should not confer upon all other pupils, who have no comparable need, the same transfer privilege. If tutorial assistance is furnished the child who needs it most, every other pupil, who has not such need, is not denied the equal protection of the laws if he is not offered the same assistance. It would be a gross perversion of constitutional doctrine to say that any governmental body may not reasonably classify citizens and their claims or that a classification based upon the need of the claimants is necessarily unreasonable.

If this be so, if a transfer of one child in dire need of it as an exception to an otherwise lawful geographic assignment plan does not divest the school board of its authority to deny transfers to those who show no such need,[7] a general provision for permissive transfers of the needy class must be permissible if the actual and special need of those to whom it applies reasonably warrants it. The existence of such need and its relationship to the rule, the majority does not consider. The court does not reach the question whether the provision, as an interim measure and as applied here, is reasonable, wise or even essential to progress. It concludes that the provision,

[6] If a member of a racial majority has comparable need of a transfer, I think a school board could and should transfer him and that its doing so would not deprive it of the power to deny transfers to other members of the majority, assigned by attendance areas, who have no comparable need.

[7] If this be not so, the conclusion cannot be premised upon anything to be found in the Constitution of the United States.

however reasonable, in combination with the assignment plan, is abstractly discriminatory, and there it stops.

If that were the stopping place, no "stair-step" plan of desegregation would ever have been approved. Such plans are not just abstractly discriminatory; inevitably in application they are concretely so. They are approved, nonetheless, when they represent reasonable progress toward ultimate compliance. Other such interim measures, though claiming no pristine purity free of discrimination's taint, are similarly approved. Indeed that is the very thing the Supreme Court required of us by its remand order in the School Cases. During this transitional period, we have no right to strike down what Charlottesville's School Board has done or to overturn its authority over assignments and transfers, unless, after full consideration, it is found that what it has done is unreasonable in the light of all of the circumstances.[8]

Since it seems to me the court has not reached the crucial question and that its abstraction is not decisive of the whole case, I have found it necessary separately to record my disagreement with the result.

Judge Bryan authorizes me to note that he joins in this dissent.

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[8] Of course, this determination is initially for the District Judge, whose findings we can overturn only within the traditional rules limiting our appellate power. Here there is no clear finding on the decisive fact of reasonableness or unreasonableness, for the District Court was of the opinion that the plan was not discriminatory, even abstractly. A remand for further consideration of the crucial question of reasonableness of the rule in the light of the needs and the differences in the needs of members of disproportionate minority and majority groups, might be appropriate. We should not undertake a final decision of that factual question; at least, we should not decide it without consideration of it.

Judgment

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8638

Doris Dillard, Vernetta Dillard, Karol L. Williams, Scheryl Williams, Althea L. Blakey, Sylvia V. Blakey, Phyllis Elaine Blakey, Phyllis Chapman, Earl Chapman, Cynthia A. Daniels, Earl Murray, Grace Murray, Gloria Murray, Theresa Murray, Allegra F. McCullough, Arnita C. Swift and Ellis A. Swift, infants, by and through their respective parents or guardians and next friends,

Appellants,

vs.

The School Board of the City of Charlottesville, Virginia, and Fendall H. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,

Appellees,

and

The School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,

Appellants,

vs.

Carolyn Marie Dobson, Melvina P. Hamilton, Gloria D. Hamilton, Rebecca A. Muse, Ruby Yvonne Dickerson, Betty Ann Swift (Harris) and George W. King, III,

Appellees.

Appeals from the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued and reargued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, as to the elementary school children who were plaintiffs in the court below, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Charlottesville, to the end that appropriate steps, by injunction or otherwise, may be taken to secure their admission to the schools of their choice for the 1962-63 school year; that said order of the said District Court as to the high school students whose admission to Lane High School the District Court ordered, be, and the same is hereby, affirmed, and the cause is hereby remanded to the said District Court to the end that appropriate steps may be taken to execute the judgment; and that the costs on appeals be paid by the School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia.

Let mandate issue forthwith.

Simon E. Sobeloff
Chief Judge, Fourth Circuit.

Herbert S. Boreman
United States Circuit Judge.

J. Spencer Bell
United States Circuit Judge.

We dissent:

Clement F. Haynsworth, Jr.
United States Circuit Judge.

Albert V. Bryan
United States Circuit Judge.

A true copy,

Teste:

Richard M. F. Williams, Jr., Clerk,
United States Court of Appeals,
Fourth Circuit

By (s) Margaret L. Davis
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8638

Doris Dillard, Vernetta Dillard, Karol L. Williams, Scheryl Williams, Althea L. Blakey, Sylvia V. Blakey, Phyllis Elaine Blakey, Phyllis Chapman, Earl Chapman, Cynthia A. Daniels, Earl Murray, Grace Murray, Gloria Murray, Theresa Murray, Allegra F. McCullough, Arnita C. Swift and Ellis A. Swift, infants, by and through their respective parents or guardians and next friends,

Appellants,

vs.

The School Board of the City of Charlottesville, Virginia, and Fendall R. Ellis, Division Superintendent of Schools of the City of Charlottesville, Virginia,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville.

In the above-entitled matter the appellees have indicated their purpose to apply to the Supreme Court of the United States for a writ of certiorari, and the appellants have expressed their intention to join in requesting the Court's favorable action thereon. This Court respectfully ventures to suggest that these issues merit review, especially.

This Court has heretofore ordered its mandate to issue forthwith and the same has been issued.

Thereafter the appellees applied to the District Court for

a stay of the mandate to allow them to seek a writ of certiorari in the Supreme Court. The appellants object to a stay, pointing out that the school term has just begun and that an indefinite stay pending disposition of the application for certiorari will operate to deny them their constitutional rights as previously determined. The District Judge has asked this Court for instructions.

Upon consideration, the Court orders that the mandate be recalled and temporarily stayed until October 10, 1962, to enable the appellees to apply for a writ of certiorari. If such a petition is filed within that time said stay shall continue until the disposition of any application for a further stay by the Supreme Court or a Justice thereof. The stay hereby granted is not intended to continue in effect until the petition for certiorari is acted upon, but only until the Supreme Court, or a Justice thereof, in its or his discretion, acts upon an application for a further stay. September 20, 1962.

Simon E. Sobeloff
Chief Judge, Fourth Circuit.
Clement F. Haynsworth, Jr.
United States Circuit Judge.
Herbert S. Boreman
United States Circuit Judge.
Albert V. Bryan
United States Circuit Judge.
J. Spencer Bell
United States Circuit Judge.

A true copy.
Teste:
Richard M. F. Williams, Jr., Clerk.
United States Court of Appeals for the Fourth Circuit.
By (s) Margaret M. Walton.
Deputy Clerk.

APPENDIX E

School Desegregation Plan of The City of Charlottesville, Va.

Recognizing that under the provisions of Section 133 of the Constitution of Virginia, as construed by the case of *Harrison v. Day*, the School Board of the City of Charlottesville has the responsibility of supervising the public schools of this city and believing that it can discharge that responsibility only by operating all the public schools under its jurisdiction in accordance with applicable decisions of the Courts of this State and of the United States, it is Resolved by the School Board of the City of Charlottesville to cease all practices of racial discrimination in the assignment of pupils to the various public schools of this city and to that end to commit itself to a plan of desegregation, to be submitted to the United States District Court for the Western District of Virginia for approval, upon the following particulars:

I. All assignments to schools commencing in September 1959 shall be in accordance with this plan.

II. In view of the fact that the twelve (12) plaintiffs in the case of *Doris Marie Allen et al. v. The School Board of the City of Charlottesville, Virginia et. al.* ordered admitted to Venable Elementary School and Lane High School by Order of the United States District Court for the Western District of Virginia entered on September 13, 1958 have so far received little or no academic instruction during the 1958-59 school session, the Superintendent shall arrange for suitable instruction for them in the form of tutoring by

qualified teachers, at such places and under such schedules as he may determine, in order to make it possible for such students to gain as soon as practicable and prior to September 1959 the degree of academic achievement ordinarily prescribed for the 1958-59 session. Such pupils shall be admitted to regular classes in the schools specified by the Order at the session commencing in September 1959, or prior thereto in the case of any individual among them whom this board in its judgment may find to be sooner qualified to perform satisfactory work in the class to which admission has been ordered.

III. No pupil shall be denied admission to any public school of this city on the ground of race or color, and in order that all assignments and requests for transfers may be made and acted upon in an orderly and nondiscriminatory way the Superintendent shall arrange for the enrollment of pupils so that each school bears, so far as is reasonably possible, a relatively equal share of the total school enrollment, taking into account such objective factors as (a) the physical facilities of the school and its available teaching personnel and (b) its location, particularly as hereinafter provided.

(a) (1) So far as is reasonably possible, the Superintendent shall limit the pupil enrollment in all elementary school classrooms to a maximum of thirty (30) pupils per classroom.

(2) So far as is reasonably possible, the Superintendent shall limit the pupil-teacher ratio in each high school to a maximum of twenty-three (23) pupils per teacher.

(b) Each elementary school shall serve the geographical district in which it is located as shown on the attached map of Elementary School Districts of the City of Charlottesville and since such districts have been designed to accomplish the purposes expressed in paragraph (a)(1) just above as well as to adjust to problems of transportation to and from the elementary schools, assignments to such schools shall in general be made from the districts respectively served by them. Also, the Superintendent may assign any pupil to a school outside of his district when the pupil and his parent or guardian indicate such a preference provided the Superintendent finds that such assignment would be consistent with the best academic interests of the pupil and not in violation of the purposes of paragraph (a)(1) just above.

In enrolling high school pupils, the Superintendent may consider the preference indicated by the pupil and his parents or guardian but in all cases shall be guided by the purposes of paragraph (a)(2) just above, as well as objective considerations related to convenience of attendance and academic qualifications.

IV. Upon assignment of any pupil to a school, his parents or guardian may request a transfer to another school and such request shall be acted upon promptly and fairly by the Superintendent after he has taken into account such factors a shis residence, his academic qualifications, his personal desires, his needs for particular courses, the enrollment at the various schools, their available teaching personnel and their physical

facilities and other lawful and objective considerations. The pupil's academic qualifications shall be considered in order to determine whether the transfer would be detrimental to his best academic interests and to this end the Superintendent shall rely upon the pupil's school record when it is sufficient for the purpose or cause him to take any standard academic or achievement test when his school record is not sufficient for the purpose.

V. The Superintendent may adopt such administrative procedures as he may think advisable to further the purposes of this plan so long as they are applicable to white and negro pupils alike and to the same extent in the case of one as in the case of the other; and in the adoption of administrative procedures in the furtherance of this plan and related to pupil assignments the Superintendent shall define and publish them in such detail as may be necessary to advise all pupils and their parents or guardians of assignments and transfers so as to enable them to raise such objection as they may have as far as possible in advance of the time when such assignments and transfers shall take effect.

I, Fendall R. Ellis, District Superintendent of Schools of the City of Charlottesville, and Recording Secretary of the School Board of the City of Charlottesville, hereby certify that the foregoing is an exact copy of the Desegregation Plan adopted unanimously by the School Board of the City of Charlottesville at a meeting properly held on February 18, 1959.